Supreme Court, U.S.
FILED
JAN 19 1983
ALEXANDER L. STEVAS
CLERK

No. 82-502

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

PALLAS SHIPPING AGENCY, LTD.,

Petitioner,

—against—

JOSEPH DURIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE*

of American President Lines, Ltd., Apex Marine Corporation, Bay Tankers, Inc., Central Gulf Lines, Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corp., Keystone Shipping Co., Lykes Bros. Steamship Co., Inc., Manhattan Tanker Company, Inc., Prudential Lines, Inc., Sea-Land Services, Inc., United States Lines, Inc.

FRANCIS X. BYRN
JOHN M. TORIELLO
One State Street Plaza
New York, N.Y. 10004
(212) 344-6800

Counsel for Amici Curiae

HAIGHT, GARDNER, POOR & HAVENS

Of Counsel

Question Presented for Review

1. Were the procedural requirements for assignment under section 33(b) of the Longshoremen's and Harborworker's Compensation Act (LHWCA) satisfied in this case?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

CONSENT OF PARTIES vii

STATEMENT OF INTEREST vii

SUMMARY OF ARGUMENT 1

POINT I—The history of the LHWCA shows that Congress did not intend to permit compensation privileges to coexist with prosecution of a third-party liability claim until 1959 at which time such a right was granted provided the employee proceeded in a diligent manner, *i.e.* commenced suit within six months 2

POINT II—The scheme of the LHWCA and the administrative practice compel the conclusion that an award in a compensation orders occurs upon agreement of the parties and acceptance of compensation 10

CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

Ambrosina v. *Transoceanic S.S. Co.*, 675 F.2d 470 (2d Cir. 1982) 12

American Stevedores, Inc. v. *Porello*, 330 U.S. 446 (1947) 5

Barulec v. *Skou*, 471 F. Supp. 358 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 572 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981) 12

Bloomer v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980) 8, 9, 18

D'Amico v. *CIA de Nav. Mar. Netumar*, 677 F.2d 249 (2d Cir. 1982) 15

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 18, 19

Federal Marine Terminals, Inc. v. *Burnside Shipping Co.*, 394 U.S. 404 (1969) 17, 18, 19

Fontana v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (S.D. N.Y. 1952), *aff'd sub nom.*, *Fontana* v. *Grace Line, Inc.*, 205 F.2d 151 (2d Cir. 1953) 5

Italia Societa per Azioni di Navigazione v. *Oregon Stevedore Co.*, 376 U.S. 315 (1964) 19

Johnson v. *Sioux City & New Orleans Barge Lines, Inc.*, 629 F.2d 1244 (7th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980) 9

Liberty Mutual Insurance Co. v. *Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977) 10

Liberty Mutual Insurance Co. v. *United States*, 290 F.2d 257 (2d Cir. 1961) 10

Landon v. *Lief Hoegh & Co.*, 521 F.2d 756 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) 18

Louviere v. *Shell Oil Co.*, 509 F.2d 278 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976) 10

Pope & Talbot v. *Hawn*, 346 U.S. 406 (1953) 18

Rodriguez v. *Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981) ... 2, 10, 14, 15, 17, 18

Ryan Stevedoring Co. v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) 5

Sabol v. *Merritt Chapman & Scott Corp.*, 241 F.2d 765 (2d Cir. 1957) 10, 11

Simmons v. *Sealand Services*, 676 F.2d 106 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 242 (1982) ... 10, 13, 14

Toomey v. *Waterman S.S. Corp.*, 123 F.2d 718 (2d Cir. 1941) 10, 11, 19

Verderame v. *Torm Lines*, 670 F.2d 5 (2d Cir. 1982) .. 15, 16

Zapico v. *Bucyrus Erie Co.*, 579 F.2d 714 (1978) 19

Statutes and Rules:

Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C.:

33 U.S.C. §905 ..... 17, 18, 19
33 U.S.C. §908(a)-§908(e) 16
33 U.S.C. §914(a) 5
33 U.S.C. §919 19
33 U.S.C. §919(b) 1, 12, 13, 14, 17, 18,
33 U.S.C. §919(c) 1, 2, 12, 13, 14, 17
33 U.S.C. §933 ..... 2, 19
33 U.S.C. §933(a) 3, 4, 5, 6
33 U.S.C. §933(b) 1, 2, 5, 6, 13, 15
33 U.S.C. §933(f) 9
33 U.S.C. §939 11

Pub.L. 92-576, §5(e) 4

44 Stat. (part 2) 1429 (1927) 3, 4

52 Stat. 1168 ..... 3, 14, 16

62 Stat. 603 4

70 Stat. 655 4

73 Stat. 391 ..... 3, 5, 8, 16

75 Stat. 203 4

20 C.F.R. §702.201 *et seq* 12

20 C.F.R. §702.231 ..... 1, 13, 14

20 C.F.R. §702.233 ..... 1, 13

20 C.F.R. §702.234 ..... 13, 14

20 C.F.R. §702.301 1
20 C.F.R. §702.301 *et seq.* 11, 13, 14
20 C.F.R. §702.311 ..... 1, 13
20 C.F.R §702.315 2
38 Fed. Reg. 26860 (September 26, 1973) 12
42 Fed. Reg. 45300 (September 9, 1977) 12

Other Authorities:

Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 8293, 74th Cong., 1st Sess. at 14 (July 31, 1935) 4, 9

Senate Hearing Before a Subcommittee of the Committee on the Judiciary, on S.2791, 74th Cong., 1st Sess. at 1, 3 (July 23, 1935) 3, 4, 15

H.R. Rep. No. 1945, 75th Cong. 3d Sess. (1938) ... 4, 15

S. Rep. No. 428, 86th Cong., 1st Sess. at 1 (1959).. 4, 5, 7, 8

S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 5 (1972) ... 8, 19

H.R. Rep. No. 1441, 92nd Cong., 2d Sess. 1 (1972) 19

H.R. Rep. No. 95-997, 95th Cong., 3d Sess. 60-61 (1978) 19

Hearings Before a Subcommittee of the Senate Committee on the Judiciary on H.R. 5690, 75th Cong., 3rd Sess. 16-18 (April 7 and 13, 1938) (1938 Senate Hearings) 4, 15

Hearings on Bills Relating to the Longshoremen's and Harborworkers' Compensation Act before a Special Subcommittee of the Committee on Education and Labor of the House of Representatives, 84th Cong., 2d Sess. 12 (May 23, 24 and June 11, 1956) 6

105 Cong. Rec. 12674 18

105 Cong. Rec. 15343 15

105 Cong. Rec. 560-562 (1959) 6

Gegan, *The Compensation Carrier's Right to Restitution for Medical Expenses Through a Lien on the Employer's Tort Recovery*, 52 St. John's L. Rev. 395 (1978).. 3

Cooper & Co. *A Causal Study of Accidents in the Longshoring Industry and OSHA's Effectiveness* 3 (1975) 19

Consent of Parties

Both parties to this case have given their written consent to the filing of the Brief *Amici Curiae* in support of the Petitioner pursuant to Rule 36 (2) of the Rules of the Court. Such written consents have been filed with the Court.

Statement of Interest

Amici Curiae comprising thirteen United States flag steamship companies collectively offer a diverse geographical representation, constituting the overwhelming bulk of the American merchant marine concerned with third party actions brought pursuant to 33 U.S.C. §905(b) of the Longshoremen's and Harborworkers' Compensation Act.

Amici Curiae are interested in fostering the purposes of the 1972 amendments to the LHWCA, restated by this Court in *Rodriguez* v. *Compass Shipping Co. Ltd.*, 451 U.S. 596, 616 (1981) which include increasing the relative importance of statutory benefits as the favored method of compensation, rather than dissipating available financial resources in costly litigation.

If litigation is to be undertaken as permitted by 33 U.S.C. §905(b), *Amici Curiae* believe it should be done promptly by the party aggrieved. As this Court said in *Rodriguez supra* p. 617 footnote 41, "After the 1959 amendments, there is such a procedure: the employee may simply file his own third-party suit within six months after accepting compensation." If not, the action is to be assigned to his employer, the party primarily responsible for the safety of working conditions. *Scindia Steam Navigation Company* v. *De Los Santos* 451 U.S. 156, 176 (1981).

BRIEF AMICI CURIAE

Summary of Argument

In assessing the meaning and effect of section 33(b) of the Longshoremen's and Harborworkers' Compensation Act (LHWCA), the entire Act must be read as a whole, and the administrative practice, which of economic necessity stresses informal resolution and elimination of purposeless ceremony, must be taken into account. In this manner, the interpretation of a single provision can be reached which accords at once with the statutory scheme and administrative reality.

The lower courts are unanimous in holding that formal compensation orders are not required by section 33(b) of the LHWCA, 33 U.S.C. § 933(b). All that is needed is informal action acknowledging the claim and permitting payment of compensation.

Administratively, the Office of Workers' Compensation Programs, which handled more than 229,000 cases in fiscal year 1982, has complied with the statutory requirement that an award in a compensation order be made within thirty days after the filing of every claim, 33 U.S.C. § 919(b) and (c), by accepting the claim, giving notice to the employer, *Id.* § 919(b), and if there is no contest concerning the employer's liability compelling payment by regulation, effective in every case, 20 C.F.R. § 702.231, .233. Unless the parties raise a dispute, papers are not drawn, conferences are not held, and investigations are not pursued. The effect of an award is automatically had because the agreement of the parties triggers the regulatory requirement for compensation payment thereby eliminating the need to file forms of compensation orders. So too, where there is a contested claim informal adjudication is pursued, resulting, in the vast majority of cases, in an agreement between the parties. *Id.* § 702.301, .311. That agreement again triggers the regulatory requirement of pay-

ment, without the formality of filing forms of compensation orders. *Id.* § 702.315. This is not only an efficient way to handle the deluge of claims, it is the only sensible way of doing it.

A holding in this case that a paper entitled "compensation order" must be filed to satisfy section 19(c), 33 U.S.C. § 919(c) and section 33(b), 33 U.S.C. § 933(b) would add an enormous burden to already limited administrative resources. This burden would be entirely unjustified since it does not further the Congressional purposes underlying the six-month and award requirements of section 33(b). Those purposes were to give the longshoreman an opportunity to investigate and weigh his options, to provide the employer with timely access to relief from a negligent third party, and to reduce litigation by permitting employer review of the merits of third-party claims.

POINT I

The history of the LHWCA shows that Congress did not intend to permit compensation privileges to coexist with prosecution of a third-party liability claim until 1959 at which time such a right was granted provided the employee proceeded in a diligent manner, *i.e.* commenced suit within six months.

This case brings before this Court for review section 33 of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 933. The section was last analyzed by the Court in *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981), wherein the nonstatutory conflict-of-interest exception to the assignment provisions of section 33(b) was strictly limited in light of 1959 amendments to this section and 1972 amendments to the Act. The case now before the Court requires definition of two phrases in section 33(b): "under an award in a compensation order filed by the Deputy Commissioner" and the further phrase "unless such person shall commence an action against such third person within six months after such award." The first

phrase was incorporated by a 1938 amendment, 52 Stat. 1168 (1938) and the second phrase was incorporated by a 1959 amendment, 73 Stat. 391 (1959).

As originally enacted in 1927, section 33 not only provided for the automatic assignment of all third party causes of action to the employer upon the acceptance of any compensation by the employee but also required the employee to elect whether to receive compensation or proceed with a third-party liability suit. 44 Stat. (part 2) 1429, 1440 (1927). This provision removed any potential for double recovery by the employee and avoided any possible confusion concerning the appropriate party to prosecute and control third-party litigation. The original provision shows clearly that Congress considered the assignment of third-party claims to be part of the *quid pro quo* for the employer's acceptance of absolute liability under the Act. *See* Gegan, *The Compensation Carrier's Right to Restitution for Medical Expenses Through a Lien on the Employee's Tort Recovery*, 52 St. John's L. Rev. 395, 397 n. 8 (1978) (discussing the New York State Workmen's Compensation Statute upon which the LHWCA was modeled).

In 1935, the United States Employees' Compensation Commission, which at the time had been charged with the administration of the LHWCA, submitted a draft bill to the 74th Congress intended to resolve administrative problems. Section 10 of that draft bill would have amended section 33(b) by incorporating the requirement that compensation be paid under an award in a compensation order before the statutory automatic assignment of the third-party claim was effected.[1] The proposed amendment did not change the provision in section 33(a), that the employee was required to elect either compensation or a third-party lawsuit.

The legislative reports and the hearings held in 1935 and 1938 (the amendment was passed by the 75th Congress) demonstrate

---

[1]Senate Hearing Before a Subcommittee of the Committee on the Judiciary, on S.2791, 74th Cong., 1st Sess. at 1, 3 (July 23, 1935) (1935 Senate Hearing).

that the sole purpose of the amendment was to reduce, but not necessarily eliminate, the possibility of an unwitting assignment of third-party rights by giving the employee an opportunity "to find out the effect of such an acceptance before taking [compensation]".[2] Such an assignment was seen as particularly inappropriate in the case of serious injury because the total compensation benefits payable were arbitrarily limited to a maximum of $7500. 44 Stat. (part 2) 1429, 1434 (1927);[3] 1935 Senate Hearing at 14. However, the Commission did not recommend, nor did Congress enact, a requirement that the Deputy Commissioner or even the employer actually notify the employee of the assignment possibility. 1935 Senate Hearing at 14.

Notably, during hearings held on the amendment in the 75th Congress two proposals were presented to the Senate Committee which would have eliminated the election requirement contained in section 33(a), permitted the employee both to accept compensation and to pursue third-party litigation, and provided a statutory lien to the employer on any third-party recovery.[4] Neither of these proposals were enacted into law. Since the continued election required in section 33(a) terminated compensation benefits upon commencement of a third-party lawsuit by the employee, the need for a statutory lien on third-party recovery was apparently not recognized. *See* S. Rep. No. 428, 86th Cong., 1st Sess. at 1 (1959) (quoted *infra*).

Unfortunately, the amendments did not provide a time limit

---

[2]Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 8293, 74th Cong., 1st Sess. at 14 (July 31, 1935) (1935 House Hearing) (Introductory Remarks of Chief Counsel, Employees' Compensation Commission). *Accord* H.R. Rep. No. 1945, 75th Cong., 3rd Sess. 9.

[3]This limitation was increased and restricted by amendments in 1948, 62 Stat. 603; 1956, 70 Stat. 655; and 1961, 75 Stat. 203. It was finally removed entirely in 1972, Pub.L. 92-576, § 5(e).

[4]Hearings before a Subcommittee of the Senate Committee on the Judiciary on H.R. 5690, 75th Cong., 3rd Sess. 16-18 (April 7 and 13, 1938) (1938 Senate Hearings).

on the exercise of the election requirement and also did not provide for the situation where compensation without an award was accepted and thereafter an election was made to pursue a third-party claim under section 33(a). Any future compensation was then precluded, but past compensation was already spent. *See American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 454-456 (1947) wherein this Court suggested that the employer could protect itself by contravening its liability and thus forcing an award.[5] The courts thereupon fashioned an equitable lien to protect the employer's interest and to prevent a double recovery by the employee. *E.g. Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (S.D.N.Y. 1952), *aff'd sub nom., Fontana* v. *Grace Line, Inc.*, 205 F.2d 151 (2d Cir. 1953).

As explained in this Court's opinion in *Rodriguez, supra*, section 33(b) caused additional concern in 1956 because of a conflict of interest between the employer and employee resulting from *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). The resulting 1959 amendment added the six-month provision and also deleted the election requirement, thus for the first time expressly providing for both the prosecution of third-party lawsuits and the acceptance of compensation by an employee. The Congressional understanding of the prior status of the law was stated in the Senate report which accompanied the Bill:

> "However, in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third party suit. He may not pursue both courses."

S. Rep. No. 428, 86th Cong., 1st Sess. at 1 (1959).[6]

---

[5]Such unnecessary contravention appears to conflict with the spirit, if not the letter, of section 14(a), 33 U.S.C. § 914(a), which since 1927 has directed the prompt payment of compensation.

[6]As noted above, this statement is not complete, since it overlooks the possibility of a late election to bring suit.

Legislation was therefore drawn which was intended to protect both the employee's right to pursue a third-party lawsuit from a conflict of interest with his employer and the employer's interest in acquiring the rights to pursue that lawsuit should the employee fail to act diligently. The legislative reports and hearings demonstrate that Congress intended that the acceptance of compensation would result in consecutive rights to any third-party cause of action. The right would initially be in the employee; upon inaction by the employee the right would be given to the employer.

Congressman Zelenko was the author of H.R. 5357 which was submitted to the 84th Congress and incorporated the basic provisions relating to sections 33(a) and (b) eventually passed by the House on April 8, 1959. 105 Cong. Rec. 560-562 (1959). In the first statement made to the subcommittee considering H.R. 5357 during hearings held on May 23, 1956, Congressman Zelenko explained in part:

> "The employee is protected in his claim against the third-party at all times whether he accepts compensation or not. *An assignment of his rights to the employer comes into being only when he fails to avail himself of third-party remedy*. The employer is also protected. He may acquire the right of assignment and then proceed to recoup his loss. *The elimination of all rights of the employer to an assignment in the instant situation would be grossly unfair.*"[7] (emphasis added)

Congressman Zelenko continued his explanation under questioning by the members of the subcommittee:

> "Mr. McDowell. Is that the reason for the 6-month provision?

---

[7]Hearings on Bills Relating to the Longshoremen's and Harborworkers' Compensation Act before a Special Subcommittee of the Committee on Education and Labor of the House of Representatives, 84th Cong., 2d Sess. 12 (May 23, 24 and June 11, 1956).

> Mr. Zelenko. I think that there should be *some length of time in which the parties can learn their rights.* Most of the time the longshoreman finds his own lawyer, but I have seen and heard of cases where many times this man does not know his rights, and sometimes through his employer, he finds out that he has certain rights because the employer is interested in getting this money back. If I had urged 10119, it would have been grossly unfair to the employer. In other words, *it would be practically left up to the longshoreman, and if he did not go ahead, the employer would lose any possible chance of getting back his compensation money.*"

Id. 14. (emphasis added)

So, too, the Senate report indicates the understanding of the full Senate Committee that in every instance the third-party rights would inure first to the benefit of the longshoreman-employee and then, upon inaction, to the employer.

> "Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The Bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery. In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action. In the event that the employer institutes proceedings and makes a recovery, the employee receives four-fifths of the amount after necessary expenses . . . and all benefits and compensation have been deducted. Thus, by giving the employer a reasonable (one-fifth) share in the net recovery an incentive is provided not to compromise the suit

> only for the amount of compensation but to protect the interests of the employee as much as possible."[5]

S. Rep. No. 428, 86th Cong., 1st Sess. 2.

Following the 1959 Amendment, the assignment provision of the Act provided a reasonable six-month period within which the employee could investigate his options and pursue a third-party action without fear of a conflict of interest. With the 1972 removal of the arbitrary limitation on recovery, note 3 *supra*, and the substantial increase in benefits, it could also no longer be said that an employee's third-party action was much more valuable than the compensation remedy. Indeed, Congress in 1972 intended to make compensation the primary, usual and, in most instances, sole source of support. S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 5. Consequently, the assignment of the claim cannot be viewed as a harsh result.

The assignment provision also continues to balance the employer's interest, by requiring that the employee act diligently so as not to jeopardize the employer's rights. Substantial delay of the assignment may not only present the employer with a stale claim, but also one that is time-barred. By reason of the substantial compensation benefits and this Court's decision in *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980), the real party in interest in third-party litigation under the Act is almost invariably the employer to a greater or exclusive extent. The employee recovers nothing even in his own third-party case unless the verdict is at least 50 percent more than the past com-

---

[5]The second and third sentences of this quote demonstrate possible cause of confusion. The reference to a statutory lien is plainly wrong. The employer's lien has always been nonstatutory in nature. *See, e.g. Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980). The third sentence makes no reference to a compensation order. To the contrary the phrasing of the sentence suggests that the six-month period runs from the receipt of compensation and, in any event, would happen in the course of every claim. As noted in Point II, the latter expectation is fully justified by section 19 of the Act.

pensation and medical payments, because the employer is entitled to its lien and, in the usual case, the attorney's fee is a one-third contingency. *Bloomer, supra.* Moreover, any excess amounts received in cases of continuing compensation benefits reduce the employer's future compensation liability. 33 U.S.C. § 933(f). The only arguable benefit directly to the employee, then, is the receipt of a lump sum payment of compensation that would otherwise have been paid over the course of time. Because of the possibility of waste, such a lump sum payment is not always in the best interest of the employee. *See* 1935 House Hearings 15, 34.

Finally, the recognized need for restraint in third-party litigation, *Bloomer, supra,* 445 U.S. at 83-84, suggests a third purpose in the continued assignment provision of the Act. Review of any possible third-party claim by the employer or the employer's insurer constitutes an added safeguard to ensure that the injuries are sufficiently significant and the cause of action sufficiently meritorious to justify the commencement of a lawsuit. *See Johnson* v. *Sioux City & New Orleans Barge Lines, Inc.,* 629 F.2d 1244, 1249 (7th Cir. 1980), *cert. denied,* 449 U.S. 987 (1980).

These threefold interests are well-protected by a rule that in uncontested claims the six-month period begins to run upon filing of the appropriate notice of compensation by the employer and the acceptance of compensation by the employee. In a contested case, the six-month period begins to run upon agreement of the parties and acceptance of compensation. Such an interpretation not only gives certainty to the assignment provision, but also accords with actual administrative practice.

POINT II

The scheme of the LHWCA and the administrative practice compel the conclusion that an award in a compensation order occurs upon agreement of the parties and acceptance of compensation.

The phrase "award in a compensation order" must be interpreted in accordance with the "realities of the situation rather than by the labels employed." *Sabol* v. *Merritt Chapman & Scott Corp.*, 241 F.2d 765, 767 (2d Cir. 1957). Accordingly, the courts have been unanimous in holding that a formal order is unnecessary. *Toomey* v. *Waterman S.S. Corp.*, 123 F.2d 718, 721 (2d Cir. 1941); *Liberty Mutual Insurance Co.* v. *Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977); *Rodriguez* v. *Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981); *Simmons* v. *Sealand Services*, 676 F.2d 106 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 242 (1982). An unduly strict interpretation would seriously undermine the Congressional understanding that the employee and employer would have consecutive rights to each third-party claim, introduce the gross unfairness of eliminating the employer's rights, and insulate nearly every third-party claim from the employer's independent review.

Under the Act, the employer's rights have been threatened and lost when, because of the administrative practice or the delay of the claimant, a formal award in a compensation order has not been issued at all or has been delayed until shortly before the expiration of a statute of limitations or other proscription. *Louviere* v. *Shell Oil Co.*, 509 F.2d 278 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976); *Liberty Mutual Insurance Co.* v. *United States*, 290 F.2d 257 (2d Cir. 1961). These courts and others have strained to prevent the gross unfairness of depriving the employer of its assignment. In so doing, however, the *Louviere* court overlooked the relevant administrative practice and, instead, expanded a cause of action which defeated one of the primary purposes of section 33, *viz.* providing certainty as to the

proper party to bring suit and avoiding a multiplicity of litigation. *Sabol* v. *Merritt Chapman & Scott Corp.*, 241 F.2d at 767; *Toomey* v. *Waterman S.S. Corp.*, 123 F.2d at 721.

The statistical reports prepared by the Office of Workers' Compensation Programs for Fiscal Years 1975 through 1982 have been lodged with the Clerk's office for the convenience of the Court. Item 8 on each report shows the following number of cases received in each year: 168,975–1975; 198,566–1976; 208,617–1977; 220,925–1978; 234,280–1979; 243,831–1980; 255,220–1981; 229,868–1982. Items 9 and 10 show that the following numbers of cases were closed without payment of compensation: 135,247–1975; 162,206–1976; 171,870–1977; 178,806–1978; 179,921–1979; 187,846–1980; 195,936–1981; 176,056–1982. Consequently, the number of new cases involving payment of benefits in 1975 were approximately 30,000 and in each year after that the number has increased to a high of nearly 60,000 such cases in 1981. Items 11 and 12 show that closed cases following compensation payment ranged from 23,000 in 1975 to more than 40,000 in 1979 and each year thereafter.

Adjudication procedures (*see* 20 C.F.R. 702.301 *et seq.*) are reported in items 15-19. In 1975, there were 13,167 adjudications, *i.e.* written, filed recommendations to pay compensation or provide medical care. The number of such adjudications rose in 1979 to 32,000 and in 1980, 1981 and 1982 these adjudications numbered more than 40,000. On the other hand, compensation orders after formal hearings numbered 280 in 1975, 454 in 1976, 738 in 1977, 746 in 1978, 1,103 in 1979, 1,370 in 1980, 1,393 in 1981, and 1,361 in 1982. Thus compensation orders were necessary in less than two percent of the disputed claims and a far smaller percentage of all claims, disputed or not. Plainly, the administrative practice stresses informal action, and minimizes administrative involvement to conserve administrative resources.

The regulations issued by the Secretary of Labor pursuant to the authority granted in 33 U.S.C. § 939 are specifically designed

to encourage this informal, but effective, administrative review. Thus, the 1973 Revision of the Regulations included the introductory comment:

> "The most significant change is in §§ 702.301 through 702.319, governing adjudication of claims by the Deputy Commissioners. As changed, the procedure is much more informal, and is in keeping with the manner in which such problems have actually been handled over the years."

38 Fed. Reg. 26860 (September 26, 1973). The intent of the 1977 Amendments to the Regulations was explained by the Department of Labor as follows:

> "The Amendments will enable the Department of Labor to process in a more efficient and timely manner the increasing number of claims filed each year."

42 Fed. Reg. 45300 (September 9, 1977). The primary concern in proposing these amendments was to avoid "unnecessary delays in the processing of claims" *Id.; Ambrosino* v. *Transoceanic S.S. Co.*, 675 F.2d 470, 472 (2d Cir. 1982); *see Barulec* v. *Skou*, 471 F. Supp. 358, 360-62 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 572 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981). The informal procedures stressed by the Regulations are an attempt to meet the statutory requirement that an award in a compensation order be issued within thirty days of the filing of *every* claim, 33 U.S.C. § 919(b), (c), and yet not sacrifice the ability of the administrative agency to process claims on the altar of formality.

20 C.F.R. § 702.201 *et seq.* specifies the procedures followed by the Office of Workers' Compensation Programs (OWCP) in the processing of claims. Formal compensation orders are unnecessary, because by regulation every agreement to pay compensation gains the status of such an order by the regulatory requirement that payment be commenced immediately. The absence of any practical necessity for formal compensation orders reduces these documents to formalities. Thus, 20 C.F.R.

§ 702.231 concerning "noncontroverted claims" requires every employer to "pay periodically, promptly and directly to the person entitled thereto the benefits prescribed by the Act", unless the employer controverts his liability. 20 C.F.R. § 702.233 imposes a 10 percent penalty for late payment of compensation regardless of the formal issuance of an award. Reports of commencement and suspension of payments must be made to the OWCP. *Id.* § 702.234. Subpart c, *Id.* § 702.301 *et seq.*, specifying the adjudication procedure for contested and controverted claims, stresses in the opening section that its purpose is to resolve controversies amicably and promptly through informal procedures. That resolution is sought at the earliest practicable date. 20 C.F.R. § 702.311. Upon reaching an agreement by telephone, written correspondence or informal conference, the duty to pay compensation attaches immediately. The Regulations thus abolish the need for individual formal compensation orders to resolve these amicably disposed of claims and allow the OWCP to devote its resources to the actual resolution of claims.

This administrative practice demonstrates that the requirement that a compensation order be issued within thirty days of the filing of every claim, 33 U.S.C. § 919(b), (c), and the corresponding terminology in section 33(b) must be interpreted to include, in uncontested claims, the filing of the appropriate forms and the commencement of compensation pursuant to the regulatory directions, and in the case of contested claims the agreement and consequent payment of compensation.

The Fourth Circuit in *Simmons* v. *Sealand Services, Inc.*, *supra*, accurately identified the attributes of an award as used in actual practice and in furtherance of the articulated legislative purposes of section 33(b). The Court found:

> "[T]he essence of an award is 'an act of ratification of compensation, whether formal or informal, and the subsequent acceptance by the claimant.' 564 F.2d at 1102. In addition, the award serves the dual purpose of protecting the welfare

> and rights of the longshoreman while not unduly delaying the employer's access to relief from the negligent third party."

676 F.2d at 109. The Court therefore found three events to be necessary to a finding of award: the initiation of compensation payments, without contravention; the filing of the employer's notice, 20 C.F.R. § 702.234; and the acceptance of the payments. *Id.* As shown by the review of administrative practice and regulations above, these are precisely the events which trigger the regulatory requirement for payment, 20 C.F.R. § 702.231 *et seq.*

The Fourth Circuit formulation accords fully with the actual statutory purpose which was only to provide an opportunity to investigate and weigh options. Such an opportunity is provided in every claim by the six-month period. This formulation also is in full accord with the congressional intent both to remove all uncertainty concerning the proper party to commence suit and to provide the employer with the right of review and access to relief in a timely fashion on every claim. Perhaps of greatest significance, this formulation also accords with the administrative practice, recognizing as it does the actual administrative compliance with the demands of section 19(b), (c).

The Second Circuit in *Rodriguez* v. *Compass Shipping Co., Ltd., supra,* 617 F.2d 955, recognized these very same administrative realities in the context of contested claims resolved pursuant to the informal adjudication procedures specified in 20 C.F.R. § 702.301 *et seq.* By looking to the realities of the situation rather than to the labels employed, the Court concluded that agreement on such a contested claim, invoking as it does the immediate duty to pay compensation, is the award contemplated by section 33(b). Although noting the limited purpose of the 1938 Amendment, the Court nonetheless attributed far more protection to that amendment than was actually intended by Congress. According to the Second Circuit, the award lan-

guage was inserted "to *insure* that the claimant-employee knew that he was foregoing his right to sue by acceptance of the compensation agreement." 617 F.2d at 959 (emphasis added), *citing* 1938 House Report No. 1945, 75 Cong., 3rd Sess. at 9 (1938). That House Report, however, only specifies the intent to give an opportunity for consideration of the employee's options, not a requirement of actual notice. There has never been a requirement that the employee be actually notified by the Deputy Commissioner or employer of the possible assignment. 1935 Senate Hearings at 14; 1938 Senate Hearings at 16-18.[9] In fact, such a requirement was included in the 1959 House bill, 105 Cong. Rec. 5560-62, but was deleted by Senate amendments, to which the House acceded, 105 Cong. Rec. 15343.

Despite the appropriate resolution of the question in the context of contested claims, the Second Circuit reached an erroneous ruling in the context of uncontested claims. *Verderame* v. *Torm Lines*, 670 F.2d 5 (2d Cir. 1982). Verderame was injured on June 3, 1975 and immediately filed a claim for compensation benefits under the LHWCA. Temporary total disability was not contested and the first payment was made on June 6, 1975. Temporary total disability continued until August 31, 1978, totaling $37,540.37. On October 27, 1978 a formal compensation order was issued directing the payment of an additional $17,824.84. Notably, by the time the formal compensation order awarding the additional $17,824.84 was issued, more than three years had elapsed from the date of injury. Verderame's third-party suit was untimely under section 33(b), if the initial uncontested temporary total disability payment was considered an award, but was timely if the compensation order was considered the only award in the case. The opinion is unclear as to whether the additional monies awarded by order dated October 27, 1978

[9]This overstatement of Congressional purpose resulted in an erroneous decision. *D'Amico* v. *CIA de Nav. Mar. Netumar*, 677 F.2d 249 (2d Cir. 1982). The Court appears to have required a showing of actual notice of the assignment to an employee who negotiated a $13,000 settlement of his compensation claim, without assistance of counsel.

consisted solely of permanent partial disability benefits or also represented some continuing claim for a deficient temporary total disability payment. In any event, the Second Circuit held, reversing the District Court, that the six-month period would not begin to run until after the longshoreman knows "what his award of compensation benefits will be." Thus, the six-month period was held to have started on the date when the agreement underlying the compensation order was reached. 670 F.2d at 8.

The error in this decision is its requirement of finality in the compensation proceedings. No such requirement is evident in the statutory language, and such a requirement would contradict the statutory scheme. Indeed, the delay of more than three years amply illustrates the difficulties caused by such an interpretation. Moreover, the congressional purposes in enacting the amendments of 1938 and 1959 were again not nearly as broad as described by the Second Circuit at 670 F.2d at 7. As has been shown above, that purpose was solely to provide a reasonable period of six months within which the longshoreman could investigate and decide whether to bring suit.

Section 19 of the Act specifies the procedures for resolution of claims. The LHWCA contemplates five types of compensation, *i.e.* permanent total disability, 33 U.S.C. § 908(a); temporary total disability, *Id.* § 908(b); permanent partial disability, *Id.* § 908(c); temporary partial disability, *Id.* § 908(e), and death benefits, *Id.* § 908(d). Of necessity, claims for permanent partial disability are usually preceded by claims for temporary total disability or temporary partial disability. *See Id.* § 908(c) (permanent partial disability to be "in addition to compensation for temporary total disability or temporary partial disability. . . ."). So too, a finding of permanent total disability is rarely, if ever, appropriate at the beginning of a case. Rather, such a finding is almost invariably preceded by a lengthy period of temporary total disability benefits until the requisite permanency can be determined.

Claims for temporary total disability and temporary partial

disability are no less subject to the section 19(b) and (c) requirement that awards be rendered within 30 days of a filing of a claim unless a hearing is requested. The words of the statute are clear and mandatory: "the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim," 33 U.S.C. § 919(c), within 20 days after notification is given to the employer. That notice, under section 19(b), *Id.* § 919(b), is required to be given within 10 days of the filing of the claim. The contemplation of the Act, therefore, is that an award in a compensation order will be given on every claim and unless a hearing is requested or ordered that compensation order will be made within 30 days of the filing of the claim. Even when a hearing is ordered, the order must be made within 20 days of the hearing, *Id.* § 919(c). This requirement of speedy resolution of compensation claims dovetails with the section 33(b) language, demonstrating that the six-month period was intended to begin within 30 days of the filing of any uncontested compensation claim.

The Sixth Circuit, in the instant case, failed to consider the import of 33 U.S.C. §919(b), (c) and the efficient manner in which the OWCP has met the statutory directive. In addition, the circuit court erroneously relied on *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969).[10] The 1972 amendments to the LHWCA raise a very serious question concerning the continuing viability of this decision. Not only does the decision encourage litigation contrary to the express intent of the 1972 amendments, but it may also be barred by the language of section 5(b), 33 U.S.C. §905(b). That section directs that the negligence action of the employee, or anyone otherwise entitled to recover damages by reason of the employee's injury against a vessel, be brought in accordance with section 33, and

[10]A third weakness in the Court's opinion is reliance on a conflict of interest due to a possible business relationship between the stevedore and vessel. As noted by this Court, *Rodriguez, supra*, 451 U.S. at 615 n. 34, that possible business relationship was addressed by Congress in repealing the election requirement and providing the six-month period in 1959.

proscribes all remedies against the vessel other than as provided in section 5(b) or under the Act. If Congress' intent to provide a comprehensive set of procedures to deal with compensation liability and its possible recoupment were not evident in 1969, that intent was made manifest at least with respect to the employee, employer and vessel by the 1972 amendments. *See Rodriguez, supra,* 451 U.S. at 615; *Landon* v. *Lief Hoegh & Co.,* 521 F.2d 756, 761 (2d Cir., 1975), *cert. denied,* 423 U.S. 1053 (1976).

If *Burnside* continues to exist after the 1972 amendments, its dissonant note threatens to upset the balance struck by Congress. Thus, recognition of the employer's nonstatutory claim for recoupment of compensation expenses raises the evil of multiple litigation to recoup the same loss, with the risks of inconsistent or duplicative recoveries. Unquestionably, such a nonstatutory claim does not divest the employee of a timely third-party lawsuit. The employee's lawsuit, however, includes damages which are duplicative of the compensation expenses, *Pope & Talbot* v. *Hawn,* 346 U.S. 406, 411-12 (1953); *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979). Those damages cannot be excised without an abolition of the employer's lien. That lien, however, has been accepted as an integral part of section 33 of the LHWCA, 105 Cong. Rec. 12674 (July 6, 1959); *Bloomer, supra,* 445 U.S. at n. 6. Thus, *Burnside* invites the prosecution of either two suits at once to recoup the same damages, or consecutive suits where the success of the first might permit the use of offensive collateral estoppel in the second, but the failure of the first would not bar the second.

In short, an unsatisfactory state of affairs, unless the compensation expense is solely the employer's damages and not a part of the employee's suit. Such a division of damages recognizes the real party in interest and also removes the need for the equitable lien. Although concededly a major step, it is not beyond the power of this Court to take. Indeed, such a step would remove the major inequity existing under the present in-

terpretation of the LHWCA: the exoneration of a stevedore, whose negligence contributes substantially to the employee's injury. *Edmonds, supra,* 443 U.S. at 270, 273; *Zapico* v. *Bucyrus Erie Co.,* 579 F.2d 714, 725-26 (1978); *See* H.R. Rep. No. 95-997, 95th Cong. 3d Sess. 60-61 (1978); Cooper & Co., *A Causal Study of Accidents in the Longshoring Industry and OSHA's Effectiveness* 3 (1975) (commissioned by OSHA). That exoneration would be abolished through application of the comparative negligence rule in the stevedore's separate action. This solution also maintains the statutory compensation liability limit since the employer's suit would be limited to the amount of compensation expenses, and counterclaims would continue to be barred by 33 U.S.C. §905(a) and (b). Such a solution has the obvious benefit, endorsed by this Court and by Congress, of encouraging safety by placing the burden on the party "whose default caused the injury. . . ." *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedore Co.,* 376 U.S. 315, 324 (1964); S.Rep. No. 1125, 92nd Cong., 2nd Sess. 2 (1972); H.R.Rep. No. 1441, 92nd Cong. 2d Sess. 1 (1972).

The Sixth Circuit's reliance on *Burnside* is misplaced. The precedence and scope of that decision has always been subject to question. That questioning becomes all the more acute by reason of the 1972 amendments.

Review of the scheme of the Act, the administrative burdens, and the administrative practice reveals the need for a practical approach to the interpretation of sections 19 and 33 of the LHWCA. Such an approach has been approved by the Courts since the decision in *Toomey* v. *Waterman S.S. Corp.,* 123 F. 2d 718, 721 (2d Cir. 1941). That approach accomplishes the legislative objectives, while preserving the viability of a Congressional enactment. Thus, the agreement to pay compensation, the filing of the appropriate notice with the OWCP and the acceptance of compensation constitute the award in a compensation order required by section 19 and referred to in section 33 of the Act.

Conclusion

The decision of the United States Court of Appeals for the Sixth Circuit should be reversed with a direction to remand the case to the district court for entry of an order dismissing the complaint.

Respectfully submitted,

FRANCIS X. BYRN
JOHN M. TORIELLO
One State Street Plaza
New York, N.Y. 10004
(212) 344-6800

Counsel for Amici Curiae